Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

November 2007

Court of Appeal order requiring each party to bear its own costs does not preclude award of attorney fees. A trial court retains jurisdiction to determine which party is the prevailing party and award attorney fees, even where the appellate court has ordered each party to bear is own costs. *Butler-Rupp v. Lourdeaux* (Cal. App. First Dist., Div. 1; August 28, 2007) 154 Cal.App.4th 918, [65 Cal.Rptr.3d 242, 2007 DJDAR 13195].

Once a case is transferred to a tribal court, state courts lose jurisdiction. Pursuant to the *Indian Child Welfare Act* (25 USC §§ 1901 ff.), the trial court transferred a child dependency proceeding to a tribal court. Counsel for the child appealed the decision. The Court of Appeal concluded that, once the transfer had been made, it lacked jurisdiction to consider the matter. *In Re: M.M., a minor* (Cal. App. First Dist., Div. 5; August 28, 2007) 154 Cal.App.4th 897, [65 Cal.Rptr.3d 273, 2007 DJDAR 13264]. The proper procedure in this case would have been for the parties to seek a stay of the transfer and to file a writ petition in the Court of Appeal. With a stay in effect, the court would have had jurisdiction to consider the matter before the actual transfer to the tribal court took effect.

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at http://members.calbar.ca.gov/discuss

Although holographic will must be signed, signature need not be at the end of document. Where decedent had written his name at the beginning rather than at the end of his handwritten will, the will was valid. There is no requirement that the testator place his signature at the end of the document. *Estate of Williams* (Cal. App. Sixth Dist.; September 17, 2007) 155 Cal.App.4th 197, [2007 DJDAR 14510].

Action based on false police report subject to anti-SLAPP statute. Monroy accused her physical therapist of sexual abuse and reported the purported incident to the police. When her charges were found to be unfounded, the therapist sued her for making false reports. The trial court denied Monroy's anti-SLAPP motion (*Code Civ. Proc.* §425.16). The Court of Appeal reversed. The report to the police was an exercise of defendant's right to petition the government and thus covered under the statute. Plaintiff could not demonstrate the existence of a prima facie case because the report was privileged. *Chabak v. Monroy* (Cal. App. Fifth Dist.; September 10, 2007) 154 Cal.App.4th 1502, [65 Cal.Rptr.3d 641, 2007 DJDAR 14101].

Five year statute to bring cases to trial is alive and well. Since the institution of judge managed litigation under the Trial Court Delay Reduction Act, nearly all civil litigation is completed within a year or two. Hence we rarely see motions to dismiss for failure to bring the case to trial within five years as mandated by *Code Civ. Proc.* §583.310.

But defendant was successful in having the case dismissed under the statute in *De Santiago v. D and G Plumbing, Inc.* (Cal. App. Fourth Dist., Div. 2; September 19, 2007) 155 Cal. App. 4th 365, [2007 DJDAR 14641]. The fact that plaintiff permitted the court to schedule the trial to start after the five year deadline, without calling the problem to the court's attention, coupled with plaintiff failure to show diligence during the earlier conduct of the litigation, made the "impracticability" exception of *Code Civ. Proc.* §583.340 inapplicable.

Plaintiff does not gain standing by purchasing a product for the purpose of suing the seller. The executive director of the California Women's Law Center bought skin lotions and creams for the purpose of suing the sellers, alleg-

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/discuss to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

ing the products were mislabeled. The trial court dismissed the action on grounds she lacked standing. The Court of Appeal affirmed. The court held that plaintiff was not "injured in fact." The costs incurred in purchasing the products, solely to facilitate her suit, did not constitute the required injury to confer standing. *Buckland v. Threshold Enterprises, Ltd.* (Cal. App. Second Dist., Div. 4; September 25, 2007) 155 Cal.App.4th 798, [2007 DJDAR 14946].

Can a lawyer refer to herself or himself as Dr.? Although California apparently has not taken a position on the question, state ethics panel are mixed on the propriety of the holder of a J.D. degree referring to him or herself as Dr. Apparently the ABA ethics committee permits the practice; some states limit the use of the designation to academic circles. For a discussion *see*, http://www.abanet.org/media/youraba/200709/ethics.html. (It might help to add this honorific to your name when attempting to get restaurant reservations. And it would make your mother proud!)

Departure of lawyer stops tolling of statute of limitation against firm. The statute of limitations in a legal malpractice action is tolled as long as the lawyer continues to represent the client. In *Beal Bank SSB v. Arter & Hadden LLP* (Cal.Supr.Ct.; September 27, 2007) 42 Cal.4th 503, [2007 DJDAR 15089] the associate who allegedly committed malpractice left the firm but continued to represent the client. When the client sued the law firm it contended the statute of limitation was tolled as to the firm as well as the departed associate. The trial court disagreed but the Court of Appeal reversed, holding that the statute was tolled against the firm. The California Supreme Court agreed with the trial court and reversed the Court of Appeal: the tolling of the statute as to the law firm ceased when the associate left the firm.

Court may only approve higher fees for out-of-town counsel if no local counsel available. Where fees charged by an out-of-town lawyer were more than was customary in the community where the litigation took place, the court may only use the higher fees in determining an award of attorney fees if the prevailing party demonstrates that obtaining local counsel was impracticable. *Nichols v. City of Taft* (Cal. App. Fifth Dist.; October 2, 2007) (Case No.: F051447) [2007 DJDAR 15329].

Anti-Slapp statute inapplicable although suit filed in response to protected activity. Appeals under the anti-SLAPP statute (*Code Civ. Proc.* §425.16 ff.) continue unabated. In the bulk of the cases defendants appeal from the denial of the motion and, in the majority of these cases, the denial is affirmed either because the conduct alleged did not "arise" from an activity protected under the statute, or because plaintiff was able to demonstrate the existence of a *prima facie* case.

Another example of an unmeritorious appeal from the denial of an anti-SLAPP motion is *Dept. of Fair Employment and Housing v. 1105 Alta Loma Road Apartments* (Cal. App. Second Dist., Div. 7; September 5, 2007) 154 Cal.App.4th 1273, [65 Cal.Rptr.3d 469, 2007 DJDAR 13843]. After landlord evicted a tenant who claimed to be disabled, by way of an unlawful detainer action, the Department of Fair Employment and Housing sued, alleging disability discrimination. The Court of Appeal affirmed denial of the anti-SLAPP motion. Just because the action was commenced after the protected activity (the unlawful detainer litigation) took place, did not mean that the suit "arose" from this activity. *See*, Weil & Brown, *California Civil Procedure Before Trial*, The Rutter Group, ¶¶ 7:235.20 ff.